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In The

Supreme Court of the United States

October Term, 1972

Docket No. 72-
72-1492

JACINTO CARMONA,

Petitioner,

vs.

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE STATE OF NEW YORK, FIRST DEPARTMENT

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In The

Supreme Court of the United States

October Term, 1972

Docket No. 72-

JACINTO CARMONA,

Petitioner,

MOORE-McCORMACK LINES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE STATE OF NEW YORK, FIRST DEPARTMENT

Petitioner prays that a writ of certiorari issue to review the order of the Appellate Division of the State of New York, First Department, unanimously affirming, without opinion, a judgment of the Supreme Court, New York County, entered in favor of respondent.

Opinions Below

The Appellate Division of the State of New York, First Department, wrote no opinion in affirming the judgment of the Supreme Court,

Opinions Below

New York County in respondent's favor. (40 A.D. 2d____, 336 N.Y.S.2d 1004)(14a).*

The Court of Appeals of the State of New York wrote no opinion in declining to review the order of the Appellate Division (15a).

The Supreme Court of the State of New York wrote an opinion denying petitioner's motion for a new trial, following a jury verdict in favor of the respondent, and a copy of this opinion is reprinted in the Appendix, infra (1a - 11a).

Jurisdiction

The judgment of the Supreme Court of the State of New York was entered on July 30, 1970 (12a). The order of the Appellate Division affirming the judgment of the Supreme Court was entered on October 31, 1972 (14a). On January 12, 1973, the Court of Appeals of the State of New York denied petitioner's motion for leave to appeal to the Court of Appeals from the order of the Appellate Division, which had affirmed the judgment of the Supreme Court (15a). The judgment of the affirmance by the Appellate Division of the Judgment of the Supreme Court was entered on February 2, 1973 (17a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

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* Page numbers beginning with "A" refer to the Appendix to this Petition.
Page numbers in parenthesis, unless otherwise indicated, refer to the transcript of the trial Record reprinted as the Record on Appeal to the Appellate Division.

Questions Presented

1. This Court having determined that the test of causation in seaman's Jones Act cases is whether employer negligence "played any part, even the slightest" in causing the injury or illness, should "proximate cause" (the more stringent test) apply when the seaman's claim is based on unseaworthiness?

2. When a seaman brings a single maritime action based on both unseaworthiness and negligence, seeking a single recovery for an industrial illness allegedly activated by the effect of a defective shipboard condition, should the jury be charged with a different standard of causation for each claim?

Statement of the Case

On March 11, 1964, petitioner, a chief cook, shipped out in that capacity aboard respondent's vessel, the S.S. Mormaccove (40, 43, 47). . . . the vessel entered the North Atlantic Ocean, en route from New York to Antwerp, Belgium, the apparatus controlling the supply of hot air to petitioner's room broke down. From that time on, the room was constantly being infused with cold air, so that its temperature remained between 40 degrees to 45 degrees Fahrenheit (48-49).

Petitioner complained to respondent's chief engineer about the constant inflow of cold air to his room (50). He informed the chief engineer that he was cold, that he was coughing and that his throat hurt (50-51). Petitioner eventually complained to the chief mate and to the master as well (51). However, the cold air continued to flow into

his quarters, and when the ship reached Antwerp petitioner was immediately hospitalized with an acute chest condition (55-56).

After two days in the hospital in Antwerp, petitioner was flown back to New York and brought directly to the United States Public Health Service Marine Hospital, on Staten Island (58). At this time, petitioner was diagnosed as having pulmonary tuberculosis (84).

Prior to sailing, petitioner had been examined at the United States Public Health facility in New York on November 15, 1963. The diagnosis at that time was pneumonia, but petitioner was not hospitalized (88), and, on November 26, 1963, petitioner was re-examined and was marked fit for duty (88). Petitioner had been examined by respondent's physician prior to sailing (61), and that physician reported that petitioner's lungs were clear (96). Nevertheless, respondent implied at trial that petitioner's active tuberculosis was caused, at least in part, by a prior voyage on a different vessel, thus putting the "cause" of petitioner's illness directly in issue.

Petitioner requested that the trial Court charge the jury that under the maritime law, a seaman is entitled to recover for illness or injury if that employer's negligence, or this ship's unseaworthy condition, played any part, even the slightest, in contributing thereto (746). The trial Court gave such an instruction with respect to petitioner's claim for relief under the Jones Act. However, on the unseaworthiness claim, the trial Court, on several occasions, instructed the jury that the

burden of proving the unseaworthy condition was petitioner's, and that he additionally had the more difficult burden of proving that such unseaworthiness "was the proximate cause of the injury" (e.g., 677, 696, 721).

Written interrogatories were submitted to the jury, the first of which read as follows:

> "1. Do you find that the Plaintiff has subtained his burden of proof of (1) unseaworthiness and (2) that such unseaworthiness was the proximate cause of the plaintiff's illness?" (Emphasis added.)

The jury returned a single negative answer to this multiple question.

Specific exceptions and objections were duly taken both to the charge (709) and to the written interrogatory (706-707), on the grounds raised here.

After the verdict, petitioner moved for a new trial. This motion was denied (1a-11a), because, in the trial Court's opinion, a double standard of causation was proper. An appeal was taken to the Appellate Division, raising the same issues set forth herein. That Court unanimously affirmed the judgment below (14a), and the New York Court of Appeals denied petitioner leave to appeal (15a).

Reasons for Granting the Writ

Rule 19(1)(a) of this Court's rules provides, in pertinent part, that among the criteria for granting a writ of certiorari in a case such as this are:

> "Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with the applicable decisions of this Court."

We respectfully submit that in this case the rulings of the state Courts not only decided a federal question of substance not previously determined by this Court -- namely, the applicable burden of proving causation in a maritime case predicated on unseaworthiness -- but also decided this important federal question in a manner contrary to the history and philosophy of maritime law principles as set down by this Court.

The need for uniformity in the maritime law requires resolution by this Court of the questions presented here.

This Court, in its interpretation of federal maritime law, has continually strived for uniformity in the administration, in both federal and state Courts, of that law. This desire for uniformity was stressed as early as 1875 in The Lottawanna, 21 Wall (88 U.S.) 558, 575 (1875), and as recently as 1970 in the case of Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

Reasons for Granting the Writ

The questions presented by the instant petition arise in every case in which the unseaworthiness of the vessel is alleged by an injured seaman. Notwithstanding the long history of the maritime law, these questions have not been previously answered by this Court, and different and varying standards have been invoked by lower state and federal Courts.

Judicial recognition of a seaman's rights to recover for unseaworthiness.

Over 90 years prior to the Congress' passage of the Jones Act (46 U.S.C. §688), the United States Supreme Court recognized that "in cases of maritime torts, . . . Courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves with the positive boundaries of mere municipal law." The Marianna Flora, 24 U.S. 1, 54-55 (1826).

In The Osceola, 189 U.S. 158 (1903), the United States Supreme Court, for the first time, held that an injured seaman could recover more than his maintenance and cure in an action based on unseaworthiness. However, in The Osceola, this Court did not address itself to the quantum of causation proof necessary with respect to injuries suffered by a seaman on an unseaworthy vessel. It spoke only of the liability of the vessel and her owner to indemnify a seaman for injuries received "in consequence of the unseaworthiness of the ship. . . ."

Reasons for Granting the Writ

What still remains to be resolved by this Court is whether those injuries, received "in consequence" of a vessel's unseaworthiness, must be proven by the injured seaman to have been "proximately caused" by such unseaworthiness, or whether it is sufficient that he prove that such unseaworthiness contributed "in any part, even the slightest," to producing the seaman's injuries or illness.

Congress, in 1920, passed the Jones Act (46 U.S.C. §688). From its inception, the Jones Act has been treated by the Courts as remedial legislation, to be liberally construed in favor of the injured seaman. See, e.g., The Arizona v. Anelich, 298 U.S. 110 (1936); Cortes v. Baltimore Insular Line, 287 U.S. 367 (1932); Storegard v. France and Canada S.S. Corp., 263 Fed. 545, 547 (2nd Cir.), cert. denied, 252 U.S. 585 (1920). In furthering the remedial nature of this legislation, this Court had held that in proving causation in FELA and Jones Act cases, a seaman need not prove that the injuries suffered by him were "proximately caused" by the negligence of the employer, but, rather, only that such negligence "played any part, even the slightest, in producing an injury to plaintiff." Rogers v. Missouri Pac. R. Co., 352 U.S. 500, 506 (1957); Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 523 (1957); see, DeLima v. Trinidad Corp., 302 F.2d 585, 587 (2nd Cir. 1962); Vareltis v. Luckenbach S.S. Co., 258 F.2d 78 (2nd Cir. 1958); Hoyt v. Central

R.R., 243 F.2d 840 (3rd Cir. 1957).*

The judicial philosophy of protecting seamen.

Beginning with The Osceola, supra, and continuing through today, this Court has manifested its concern for the safety and welfare of seamen and others employed in related maritime occupations. The shipowner's obligation to indemnify seamen for injuries resulting from unseaworthiness has become a species of absolute liability, and this Court has created rights and remedies consistent with this policy.

The philosophy underlying this policy was extensively expressed in Seas Shipping Co. v. Sieracki, 328 U.S. 85, 93-94 (1945). This Court, in taking note of the hazards of marine service which unseaworthiness places on the men who perform that service, there noted:

> "These, together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measurable in money, upon the owner regardless of his fault. Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he

* DeLima held that it was mandatory to charge the jury with the "played any part" language and similarly mandatory not to use "proximate cause" language in instructing a jury deciding a seaman's Jones Act claim (302 S.2d at 587).

> is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost.
>
> These and other considerations arising from the hazards which maritime service places upon men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, analogous to other well known instances in our law" (Emphasis added.) (328 U.S. at 93-94).

In 1963, in Reed v. S.S. Yaka, 373 U.S. 410 (1963), this Court again had occasion to reaffirm its holding in Seas Shipping Co. v. Sieracki, supra, and emphasized the reasons for this doctrine of unseaworthiness being a concept involving liability without fault:

> "In Seas Shipping Co. v. Sieracki, 328 U.S. 85, 90 L.Ed. 1099, 66 S.Ct. 872 (1946), . . . we noted particularly the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policy' of the doctrine of seaworthiness, which we held not to depend upon any kind of contract. 328 U.S. at 93-95" (373 U.S. at 413).

Most recently, in Waldron v. Moore-McCormack Lines, Inc., 386 U.S. 724, 728 (1967), the Court, citing prior opinions:

> "noted that 'the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the "humanitarian policy" of the doctrine of seaworthiness' "

require that a seaman's rights to recover under unseaworthiness be broadly maintained and reach beyond the dimensions of his alternative negligence claim.

Sieracki, supra, "provides the basis for incorporating risk distribution theory into maritime law" and "points the way to remaking [the] seaworthiness doctrine into a broad-based strict-liability scheme, designed to provide high-risk employees against maritime injuries." Note, Risk Distribution and Seaworthiness, 75 Yale L.J. 1174, 1175, 1188 (1966). It is in the framework of the Sieracki philosophy, taken in context with the liberal and remedial purpose of the Jones Act, that this Court should now decide if the discarded negligence test of "proximate cause" is the proper burden for an injured seaman to bear when he seeks to prove that the unseaworthiness of the vessel contributed to his injuries or illness.

The "proximate cause" test in unseaworthiness cases is confusing and is an anachronism.

The term "proximate cause," well known to the legal profession, is a troublesome one for juries, difficult to digest and to apply. On its face, the words are foreign to a juror's vocabulary. The oral definition provided by the trial Judge during the final charge is necessarily brief and not always helpful.

This Court in Kermarec v. C. G. T., 358 U.S. 625, 630-31 (1959), excluded from the maritime law the historical common law distinctions between business visitors, social guests and licensees and held that a simple, easily digestible instruction of "reasonable care under the circumstances" was instead to be used in maritime cases as a standard for negligence.

As noted in Kermarec, "fine gradations in the standards of care ... and sub-classifications bred by the common law" (358 U.S. at 630-31) have no place in modern maritime law. The same test of simplicity and jury digestibility should apply to eliminate the legal syntax of "proximate cause" from the vocabulary of jury instructions for unseaworthiness claims.

This case is similarly linked to the overall policies for maritime litigation established by this Court in Fitzgerald v. United States Lines Co., 374 U.S. 16, 18, 21 (1962). There, this Court stated trial procedures which "unduly complicate and confuse" a jury trial of a seaman's claim arising out of a single accident are to be avoided (374 U.S. at 19).

Reasons for Granting the Writ

An unseaworthiness claim eliminates the requirement of proving notice to the shipowner and opportunity to correct the defective condition, which remain requisites of a seaman's alternate negligence claim. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 540-41, 549-50 (1960). But other than these differences, the facts and proof on trial are virtually the same for both claims, and the use of two separate tests of causation in instructing the jury is utterly inconsistent with the Fitzgerald and Kermarec admonitions.

Courts and commentators have long noted the confusing and misleading quality of the term "proximate cause." See, e.g., Domeracki v. Gulf Oil Corp., 202 F. Supp. 89 (E.D. Pa. 1962); Morris, Duty, Negligence and Causation, 101 Pa. L. Rev. 189, 206 (1952); Adams, Proximate Cause is Too Remote, 17 So. Dak. L. Rev. 316 (1972); Comment, Proximate Cause - Confusion of Jurors by Misleading Label, 34 Marq. L. Rev. 204 (1951). The Restatement of Torts, Second, avoids the use of the phrase "proximate cause" entirely.

Causation is a question of judicial philosophy.

The concept of "proximate" causation, as utilized by the Courts as a tool for imposing or cutting off liability, is really a concept which is designed to embrace judicial philosophies or policies in particular cases. In his dissenting opinion in the landmark case of Palsgraf v. Long Island R. Co., 248 N.Y. 339, 352, Judge Andrews noted that:

> "What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics." (Emphasis added.)

The "policy" behind the burden of causation judicially imposed must be considered in the light of an analysis of the risks against which judicial protection is to be afforded. Probert, Causation in the Negligence Jargon: A Plea for Balanced Realism, 18 Fla. L. Rev. 369, 379 (1965).

One commentator has observed that "writers have long debated the proper approach to this problem [proximate cause], but all have agreed that it is one of policy. Reduced to its simplest terms, the question in every case is the same: between a defendant who has been negligent and a plaintiff who has been harmed as a result, upon whom should the loss be placed?" Note, Proximate Cause Under the Jones Act, 18 Hastings L.J. 981, 985 (1967).

In expanding the judicial policy of according relief to injured seamen, this Court has noted that "it would be an anomaly" to resuscitate and extend to suits founded on the warranty of unseaworthiness burdens and defenses discredited by the Jones Act in suits for negligence. Mahnich v. Southern S.S. Co., 321 U.S. 96, 102-103 (1943).

The stated policy, announced by this Court in Sieracki and its progeny, for liability for unseaworthiness, has thus been to give broad relief to the injured seaman because of the risks of marine service. Causation too presents a question of policy which must evaluate these identical risks. It is difficult, if not impossible, to reconcile the policy of the maritime law to benefit the injured mariner by making unseaworthiness a "species of liability without fault" with a rule compelling him to prove such unseaworthiness to be the "proximate cause" of those injuries - a more difficult, onerous, and confusing burden than that imposed by the Jones Act. Nevertheless, this was the burden imposed below, and the paradoxical conflict created thereby should be resolved by this Court.

The conflicts between the lower Courts require resolution by this Court.

In its brief to the Appellate Division and in its brief in opposition to petitioner's motion for leave to appeal to the Court of Appeals, respondent cited In Re Marine Sulphur Queen, 460 F.2d 89 (2nd Cir. 1972); Fitzgerald v. A. L. Burbank & Co., 451 F.2d 670 (2nd Cir. 1971); Barrios v. Louisiana Construction Materials Co., 465 F.2d 1157, 1160 (5th Cir. 1972) and an unreported charge of Judge Gurfein in the case of Ayala v. Moore-McCormack Lines, Inc., 68 Civ. 1690 (S.D.N.Y. 1972) to support its claim that the proper standard of causation in an unseaworthiness case is that of "proximate cause."

In Savard v. Marine Contracting Inc., 471 F.2d 536, 544 (2nd Cir. 1972), the Court of Appeals, intimated that the test of unseaworthiness was whether the purported defect "did not contribute" to the seaman's death.

In Domeracki v. Gulf Oil Corp., 202 F. Supp. 89 (E.D. Pa. 1962), the District Court charged that plaintiff had to prove that the negligence of the defendant shipowner or the unseaworthiness of its vessel was the "proximate cause" of plaintiff's injuries. Proximate cause was defined in the charge in terms of the natural and reasonably probable consequences of defendant's alleged acts.

On plaintiff's motion for a new trial, the trial Court held this charge to be erroneous. However, it did not order a new trial. It concluded that this error had subsequently been cured:

> "When, after all this, plaintiff requested that the residual remains of the definition of proximate cause used at the beginning of the charge should be eliminated, his suggestion was accepted. The court charged the jury that what it had just been told - i.e., if the negligence of the defendant or the unseaworthiness of the vessel played any part, no matter how small, in producing plaintiff's injury or aggravating any prior injuries - was to be considered by them 'as the standard in determining whether the defendant is liable, notwithstanding anything that I may have told you earlier in the

definition of proximate cause.'" (202 F. Supp. at 92) (Emphasis added.)

Such an instruction, in which unseaworthiness is causally proven if the jury concludes that it "played any part, no matter how small, in producing plaintiff's injury," is in accord with this Court's articulated philosophy of the maritime law. The "proximate cause" instruction, as given and defined in the case at bar, is not. Trial and appellate Courts are divided on this question, which arises in every seaman's action to recover for shipboard injuries. So that this question might be finally resolved by this Court, certiorari should be granted at this time.

This Court should fix the measure of proving causation in unseaworthiness cases to avoid confusion in evaluating defendant's proof of comparative negligence.

It is hornbook law that under the maritime law a seaman's contributory negligence reduces his recovery, and that this doctrine applies whether the seaman claims unseaworthiness alone, negligence alone, or both.

Several Courts have held that the standard of causal relationship with respect to the shipowner's burden of proving contributory negligence is the same as that which applies to plaintiff's proof of negligence. Fleming v. American Export Isbrandtsen Lines, Inc., 451 F.2d 1329 (2nd Cir. 1971); McBride v. Loffland Bros. Co., 422 F.2d 363 (5th Cir. 1970).

In Page v. St. Louis Southwestern Railway Co., 349 F.2d 820 (5th Cir. 1965), the Court of Appeals held that, in an FELA case, the trial Court errs if it charges that the defendant's burden of proving plaintiff's contributory negligence is one of "proximate cause." This decision has been criticized, see, Comment, Legal Cause, Proximate Cause and Comparative Negligence in the FELA, 18 Stan. L. Rev. 929 (1966), but the Sixth Circuit has similarly held. Ganotis v. New York Cent. R. Co., 342 F.2d 767 (6th Cir. 1965). At least one Court has held that in an FELA case the burden of proving causation on the part of the plaintiff-employee is that of "simple cause", while the burden on the defendant railroad is that of "proximate cause." Missouri-Kan. - Tex. R.R. v. Shelton, 383 S.W.2d 842, 846 (Tex. Civ. App. 1964), cert. denied, 382 U.S. 845 (1965). See Comment, 18 Stanford Law Review, 929 (1966).

Cumbersome and unnecessary difficulties arise when instructing a jury as to the burden of proving contributory negligence if different burdens of proving causation are held to exist with respect to the seaman's allegations of unseaworthiness and negligence. A prime example of this confusion arises in the instant case, where, in its written interrogatories to the jury, the trial Court imposed identical burdens of proving contributory negligence upon respondent with respect to reducing damages arising from petitioner's unseaworthiness and negligence claims, while at the same time placing different burdens for each claim upon the

petitioner (774-775) (19a). Indeed, the trial Court here imposed a "proximate cause" burden on petitioner's proof of unseaworthiness, while imposing on defendant only a "simple causes" requirement of proving comparative negligence with respect to both of petitioner's claims.

The Court in Page, supra, felt that the jury would be unnecessarily confused by two separate burdens of causation in the same case. This confusion exists too with respect to the two different degrees of causation petitioner here was required to prove as to his unseaworthiness and Jones Act negligence claims. And this situation is all the more puzzling when it is remembered that unseaworthiness is a species of liability without fault, intended to be more favorable to the seaman, but which, according to the Courts below in the instant case, would require a more stringent burden of proving causation than that necessary to prove Jones Act negligence.

Conclusion

Cases in which the choice of causal terminology is critical are numerous. In many seaman's cases which go to trial, including the instant case, some assertion of preexisting disposition of the plaintiff, or of a prior accident or during earlier maritime employment, is urged by the shipowner to bar recovery. Thus, says the shipowner, the plaintiff's condition was not "proximately" caused by conditions aboard its vessel, but by some other event. When the jury is charged that the causal connection to be established under the seaman's burden of proof is that the shipboard condition

"played some part" in causing plaintiff's injuries, as set forth by this Court in Rogers and Ferguson, and by the Second Circuit in DeLima, these defense assertions will usually fail.

But the shipowner can ~~after~~ often demonstrate that it had no notice, or that it had no opportunity to correct a defective shipboard condition while out at sea, and thus successfully defend against a seaman's Jones Act negligence claim. A requirement that the seaman must then prove an admittedly unseaworthy shipboard condition was "the proximate cause" of his injury in order to recover becomes a crucial element which will, contrary to this Court's expressed philosophy, bar an injured seaman's recovery even when such condition "played some part" in causing the seaman's injuries.

This Court has continually rendered decisions incorporating the liberal concepts and remedial philosophy of the Jones Act into the federal maritime laws governing unseaworthiness. See, e.g., Moragne v. States Marines Lines Inc., 398 U.S. 375 (1970); McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958). This case provides an ideal vehicle to continue this progressive pattern.

This Court has never decided the appropriate measure of proving causation in unseaworthiness cases. In the instant case, and in other cases, Courts have held that the burden is one of "proximate cause", a more substantial burden which is contrary to this Court's policies holding a seaman's right to recover for injuries caused by unsea-

worthiness as broader, if anything, than rights arising from negligence.

This case is the proper one for this Court's resolving this frequently arising problem. The Court below charged different standards of causation with respect to petitioner's burden of proving negligence and unseaworthiness, while charging the same standard of causation with respect to respondent's burden of proving contributory negligence

This case presents one of the most important and unsettled aspects of maritime law; the standard of causation to be proven in each seaman's unseaworthiness case. The issue is presented to the lower federal and state Courts in almost every personal injury maritime case, and, despite the many years of maritime law, has never previously been resolved by this Honorable Court.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Conclusion

Dated: New York, New York

Respectfully submitted,

s/ Theodore H. Friedman
THEODORE H. FRIEDMAN

s/ David G. Miller
DAVID G. MILLER

Attorneys for Petitioner
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212-371-3200

Decision on Post-Trial Motion

SUPREME COURT : NEW YORK COUNTY

TRIAL TERM : PART X

JACINTO CARMONA,

Plaintiff,

-against-

MOORE-McCORMACK LINES, INC.,

Defendant.

GOMEZ, J.:

The plaintiff moves for a new trial, following a jury verdict in favor of the defendant, on the following grounds: (1) that the written questions submitted to the jury and elements of the charge may have contained some error and/or confused the jury; and (2) that the verdict for the defendant was against the weight of the evidence.

The plaintiff has submitted an extensive memorandum on question No. 1, which was presented to the jury and which stated as follows: "Do you find that the plaintiff has sustained his burden of proof of (1) unseaworthiness and (2) that such unseaworthiness was the proximate cause of the plaintiff's illness?" It is the plaintiff's contention that the Court erred in charging the jury that the plaintiff could not recover unless the unseaworthiness was the proximate cause of the plaintiff's illness.

Decision

The plaintiff, Jacinto Carmona, brought suit against the defendant, Moore-McCormack Lines, alleging that the improper ventilation of his quarters on board the SS MORE MACCOVE caused an activation of a dormant or inactive tubercular condition. The suit is brought on two separate theories and causes of action: (1) that the vessel was unseaworthy; and (2) that the defendant was negligent. Although each theory rests upon the same facts, different principles of law govern the plaintiff's right of recovery in each instance and therefore each claim must be considered separately.

The cause of action for the unseaworthy condition of the plaintiff's quarters is based on the ancient law of the sea known as the warranty of seaworthiness. In order to provide safe working conditions for seamen, the law evolved so as to place a duty upon the owner of the vessel to supply and maintain a seaworthy vessel for the benefit of the crew. The warranty of seaworthiness requires that the ship be reasonably safe and fit for the crew to carry on its duties.

The plaintiff contends that the question presented to the jury, as set forth above, was improper since it asserted that, for the plaintiff to recover, the unseaworthiness must have been the proximate cause of the plaintiff's illness. The plaintiff's position is that the language employed increased the burden of the plaintiff and that the plaintiff was merely by law required to prove that the unseaworthiness played any part, even the slightest, in producing an injury to the plaintiff,

rather than to have to prove that the condition or illness was the proximate cause of the plaintiff's illness.

The second cause of action of the plaintiff is based on the negligence of the defendant and, specifically, upon federal statute. Title 46, U.S. Code Ann., §688, states:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; ...."

By statute therefore seamen are accorded the same rights which were granted to railway employees under Title 45, U.S.C.A., sections 51-60. The negligence action, therefore, is statutory, and the rights of the plaintiff are determined by statute and the decisional law in interpretation of the statute.

It has been held that the test to be employed by the jury is whether the proofs justify with reason the conclusion that the employer's negligence played any part, even the slightest, in producing the injury or illness for which damages are sought (Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 506, 507; Ferguson v. Moore-McCormack Lines, 352 U.S. 521). Thus section 51 of Title 45, U.S.C.A., which provides that an employee may recover for "such

injury or death resulting in whole or in part (emphasis added) from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment", has been interpreted to the effect that any negligence of the defendant or employer which plays a part, even the slightest, in producing the injury or death will be sufficient for the employee to recover.

Decisions are numerous which set forth the Court's obligation in Federal Employers' Liability Act cases to define and instruct the jury that the proximate cause in such cases, is any act or omission which plays any part, no matter how small, in actually bringing about or causing the injury (Iannacito v. Denver & Rio Grande Western Railroad, 380 F.2d 1019; Page v. St. Louis Southwestern Railway Company, 312 F.2d 84, 87-92; De Lima v. Trinidad Corporation, 302 F.2d 585).

The Honorable William C. Mathes, United States District Judge for the Southern District of California, in Volume 28 F.R.D. 401, 497, sets forth as a guide for federal jury instructions the following charge regarding proximate cause in FELA cases:

> "An injury is proximately caused by an act or omission whenever it appears that the act or omission played any part, no matter how small, in actually bringing about or causing the injury. So if you find from the evidence that any negligence on the part

> of the defendant contributed in any way or manner towards any injury suffered by plaintiff, you may find that injury was proximately caused by defendant's act or omission."

The development of the law under the Federal Employers' Liability Act is clearly a departure from the common law theory of negligence. The definition of proximate cause employed at common law, which is spoken of as the efficient cause or as the cause without which the injury would not have occurred, or the direct or dominant cause, is not the definition employed under the FELA or Jones Act cases (Eglsaer v. Scandrett, 151 F.2d 562). On the other hand, the cause of action based on the unseaworthiness of the vessel does not arise from statute but has evolved from common law.

No authority has been cited by the plaintiff's counsel nor after diligent search has any been found to indicate that the traditional common law definition of proximate cause is not to be employed in charging the jury in a cause of action for unseaworthiness. Rather, authority is available indicating to the contrary -- that the plaintiff could recover in his cause of action on the unseaworthiness of the vessel if the unseaworthiness was the proximate cause of the injury or illness sustained. The Honorable William C. Mathes, in the same jury instructions cited above, distinguishes proximate cause in civil cases from the proximate cause definition cited above in the FELA cases. The standard proximate cause instruction set forth on page 464 of the instructions cited above defines "proximate cause" as follows:

> "An injury or damage is proximately caused by an act or omission whenever it appears: (1) that the act or omission played a substantial part in actually bringing about or causing the injury or damage, and it further appears (2) that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission."

Norris, in his textbook, Maritime Personal Injuries, Second Edition, Section 49 at page 105 states:

> "Proximate cause. -- The mere showing of personal injury in connection with a vessel and that there was an unseaworthy condition is not sufficient to justify a recovery of damages in favor of the plaintiff. The vessel or her owner can be held liable only when the injury has been proximately caused by the unseaworthy condition. An injury must be in consequence of the unseaworthiness; it must be connected with and result from it. The unseaworthy condition must be causally connected with the injury.
>
> Proximate cause is a question of fact for the trier of the facts to determine. In a trial to a jury, if there is an evidentiary basis it should be submitted to them."

Likewise, Judge Mathis, supra, page 440, in his instructions for claims of injuries resulting from unseaworthiness sets forth the following instruction:

Decision

> "Liability for an unseaworthy condition does not in any way depend upon negligence or fault or blame. That is to say, the shipowner or operator is liable for all injuries and consequent damage proximately (emphasis added) caused by an unseaworthy condition existing at any time, even though the owner or operator may have exercised due care under the circumstances and may have had no notice or knowledge of the unseaworthy condition which proximately caused the damage."

Thus it can readily be seen that the complaint of unseaworthiness is coupled with a requirement that it be the proximate cause of the injury which results. While proximate cause is also employed as a term in the FELA cases, in those instances it is specifically defined as being any negligence, even the slightest amount of negligence which plays any part in producing the injuries which are sustained. Consequently it would be improper to use the term, proximate cause in the traditional sense in FELA cases and Jones Act cases and if the term is employed at all in such cases it must be specifically defined as being any negligence in whole or in part which contributes even in the slightest to the injury sustained. However, there appears to be no authority for employing the FELA definition of proximate cause in relation to liability caused as a result of the unseaworthiness of a vessel.

Decision

While the causes of action for unseaworthiness and negligence may arise out of the same set of facts and circumstances, the law regarding each must be separate and distinct and must be kept separate from one another. Unseaworthiness is a cause of action based on breach of warranty of fitness or use and it is in the nature of an absolute duty on the shipowner. It does not depend on the fault of the shipowner nor on the question of whether he had notice of the condition. (See Mitchell v. Trawler Racer, Inc. 362 U.S. 539, 549-550.)

The cause of action based on negligence requires proof of some act or failure to act on the part of the employer shipowner and it requires in many instances notice of the condition. Unseaworthiness, while broader in scope and absolute in nature must proximately cause the resulting injuries; while negligence arising out of an act or failure to act by the employer and more limited in scope, and including the necessary proof of notice is not required to proximately cause the resulting injuries, but is sufficient if it in any way contributes to the damages sustained.

These causes of action are distinct, each consists of different elements and must be submitted to the Court or the jury as the trier of the fact separately. Hence, the continuing distinction is justified and while they appear at times to merge, the basic distinction between warranty and negligence requires that since each is independent of the other, that they be kept separate and considered separately, by the trier of the fact. (See Bartholomew v. Universe Tankships, Inc.,

263 F.2d 437, 443-448, cert. den. 359 U.S. 1000.) Therefore, the motion of the defendant that the first written question submitted to the jury should not have stated that the unseaworthiness must have been the proximate cause of the plaintiff's illness is denied. (Connorton v. Harbor Towing Corp., 237 F. Supp. 63, aff'd 352, F.2d 517.)

The plaintiff further urges that the second written question that the Court submitted to the jury, which was the question on the second cause of action based on negligence was also defective. The question submitted was as follows: "Do you find that the plaintiff has sustained his burden of proof of (1) that the defendant was negligent; and (2) that the defendant's negligence played some part in causing the plaintiff's illness."

The plaintiff contends that the proper wording to be employed was that any negligence that played any part, even the slightest, in producing the injury would have been sufficient to establish liability. The plaintiff states that the Court in using the word, some, rather than, any, (emphasis added) or in stating that it was required that the defendant's negligence played some part in causing the plaintiff's illness rather than stating that if the defendant's negligence played any part, even the slightest, in producing the plaintiff's illness that the Court used language which placed a greater obligation upon the plaintiff than was required under law. Unquestionably the plaintiff is correct in stating that the language of the FELA statute and the cases is as he has set forth. However,

the distinction between the defendant's negligence playing some part in causing the plaintiff's injury and in playing any part in causing the plaintiff's injury is not sufficiently significant to warrant setting the verdict aside. The instructions in the charge adequately set forth the law on the issue of negligence and the wording of the question, with the word, some, rather than, any, cannot be considered to have substantially affected the rights of the plaintiff. Furthermore, the Court has no recollection of strenous objection to the wording of the second question by counsel for the plaintiff at the time of trial. Accordingly, since the distinction between the words, any, and, some is primarily one of semantics it cannot be considered in itself to have been prejudicial to the plaintiff.

The second part of the defendant's motion is to set the verdict aside as being against the weight of the evidence. There was conflict in the testimony at the trial as to whether the room of the plaintiff, Jacinto Carmona was improperly ventilated or cold. It was within the province of the jury as the trier of the fact to determine whether the room was improperly ventilated and whether it arose as a result of the unseaworthiness of the vessel or as a result of the negligence of the defendant. Further, it was in the province of the jury to determine if the unseaworthiness was the proximate cause of the plaintiff's injury or if the negligence of the defendant played any part in causing the plaintiff's illness. (See Castro v. Moore-McCormack Lines, Inc., 325 F.2d 72, 74; 12 F.R.D., 43-45; Lieberman v. Matson Navigation Co., 300 F.2d 661.)

Decision

In the final analysis, the Court is faced with the question of whether the conclusions drawn by the jury are reasonable in the light of the evidence presented in the case. Upon an examination of the record, the Court cannot say that the verdict of the jury is without support in the evidence. Whether the Court would have arrived at the same conclusions as the jury is not the issue. The jury on the evidence in the record could reasonably find verdicts for the defendant and there is no justification for the Court to substitute its conclusions for those of the twelve jurors.

The motion therefore of the Plaintiff after trial to set aside the jury verdicts in favor of the defendant is denied in all respects.

Dated: July 2nd, 1970.

FILED Jul 6, 1970
NEW YORK
CO. CLERK'S OFFICE

s/ G.J.
J.S.C.

Judgment

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

JACINTO CARMONA,

Plaintiff,

-against-

MOORE-McCORMACK LINES, INC.,

Defendant.

JUDGMENT

The above entitled action having duly come on for trial before Mr. Justice Manuel A. Gomez and a jury at a Trial Term Part 10 of the Supreme Court, held in and for the County of New York, at the Courthouse therein, in the Borough of Manhattan located at 60 Centre Street, on the 21st, 22nd, 23rd, 26th, 27th, 28th, 29th and 30th days of January, 1970, and on the 2nd day of February, 1970, and the plaintiff having appeared by Henry Isaacson, his attorney, and Theodore Freedman his trial counsel, and the defendant having appeared by John H. Reilly, Jr., trial counsel and the issues having been duly tried and the Court having directed the jury to return to a general verdict with written answers to written interrogatories, as follows:

"Do you find that the plaintiff has sustained his burden of proof of (1) unseaworthiness and (2) that such unseaworthiness was the proximate cause of the plaintiff's illness?"

"Do you find that the plaintiff has sustained his burden of proof (1) that the defendant was negligent and (2) that the defendant's negligence played some part in causing the plaintiff's illness?"

And the jury having rendered a general verdict for the defendant and having returned written answers of "no" to said written interrogatories;

And the costs and disbursements of defendant having been taxed at $196.25.

Now, therefore, on motion of Browne, Hyde & Dickerson, the attorneys for the defendant, it is

ADJUDGED that the defendant herein have judgment against the plaintiff upon the merits on the issue of unseaman fitness and on the issue of negligence and for the sum of $196.25 costs and disbursements as taxed.

Judgment signed and entered this 30th day of July, 1970.

s/ Norman Goodman
CLERK

TO: HENRY ISAACSON, ESQ.
Attorney for Plaintiff
38 Park Row
New York, N.Y.

PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON, ESQS. THEODORE FREEDMAN, ESQ.
Trial Counsel for Plaintiff
477 Madison Avenue
New York, N.Y.

Order of Affirmance of the Appellate Division

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on October 31, 1972.

Present-Hon. Emilio Nunez, Justice Presiding
Theodore R. Kupferman
Francis T. Murphy, Jr.
Samuel W. Eager
Louis J. Capozzoli, Justices

JACINTO CARMONA,

Plaintiff-Appellant,

-against-

Order of Affirmance on Appeal from Judgment 5944

MOORE-McCORMACK LINES, INC.,

Defendant-Respondent.

Order of Affirmance

An appeal having been taken to this Court by the plaintiff-appellant from the judgment of the Supreme Court, New York County (Gomez, J.), entered July 30, 1970, in favor of the defendant and against the plaintiff on the issue of unseaworthiness and on the issue of negligence and for the sum of $196.25 costs and disbursements as taxed,

and said appeal having been argued by Mr. Theodore H. Friedman of counsel for the appellant, and by Mr. John H. Reilly, Jr. of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed, without costs and without disbursements.

ENTER:

HYMAN W. GAMSO
CLERK.

Order of the Court of Appeals

STATE OF NEW YORK, IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twelfth day of January A.D. 1973.

Order of the Court of Appeals

PRESENT, Hon. Stanley H. Fuld, Chief Judge, Presiding.

1 Mo. No. 33

JACINTO CARMONA,

Appellant,

vs.

MOORE-McCORMACK LINES, INC.,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary printing disbursements.

A copy

s/ Kimball
Deputy Clerk

Judgment (Filed Feb. 2, 1973)

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

JACINTO CARMONA,

Plaintiff,

-against-

Index No. 63/66

MOORE-McCORMACK LINES, INC.,

Defendant.

Jacinto Carmona, the above named plaintiff having appealed to the Appellate Division, First Department, from a judgment of the Supreme Court, New York County, entered July 30, 1970 in favor of the defendant and against the plaintiff on the issue of unseaworthiness and on the issue of negligence and for the sum of $196.25 costs; and the Appellate Division, by order entered October 31, 1972, having unanimously affirmed said judgment without costs and without disbursements; and the remittitur of the Appellate Division having been duly filed herein; and the Court of Appeals in a decision dated January 12, 1973 having denied plaintiff-appellant's motion for leave to appeal to the Court of Appeals with $10. costs and necessary printing disbursements;

Now, on motion of Hyde, Dickerson & Reilly, attorneys for defendant Moore-McCormack Lines, Incorporated it is

Judgment

ADJUDGED that the judgment entered herein on the 30th day of July, 1970, be and the same hereby is in all respects affirmed.

IT IS FURTHER ADJUDGED that Moore-McCormack Lines, Incorporated recover of Jacinto Carmona costs and disbursements as taxed in the sum of $236.94 and execution therefor.

Judgment signed and entered this 2nd day of February, 1973.

s/ Norman Goodman
Clerk

FILED
FEB. 2, 1973
NEW YORK
COUNTY CLERK's OFFICE

Moore McCormack Lines, Inc.
2 Broadway,
New York City

Jacinto Carmona
1022 Boston Road
Bronx, New York

Questions on General Verdict

JACINTO CARMONA,

-v-

MOORE-McCORMACK LINES, INC.

cc No. 63/66

GENERAL VERDICT:

1st Theory of Action (SEAWORTHINESS)

1. Do you find that the Plaintiff has sustained his burden of proof of (1) unseaworthiness and (2) that such unseaworthiness was the proximate cause of the plaintiff's illness?

(Answer Yes or No) _____

(If your answer is No, then there is no need to answer any of the remaining interrogatories on this page - proceed to next page.)

---

2. If you find that the Plaintiff has sustained his claim, what do you find is the total amount of the damages?

$_____

3. Do you find that the Defendant has sustained its burden of proof that the Plaintiff, by his own conduct, contributed to the accident in whole or in part?

(Answer Yes or No) _____

Questions on General Verdict

4. If your answer to question No. 3 is in the affirmative, to what extent (in percentage was Plaintiff contributorily negligent?

_____%

5. If you have found that the Defendant has sustained its burden of proof that the Plaintiff was contributorily negligent, then what sum have you deducted from the total amount of the damages you have found to have been sustained by the Plaintiff in your answer to Question No. 2 above?

$_____

6. Net amount of your verdict. (Subtract amount given in answer to question No. 2 by amount stated in answer to question No. 5.) $_____

Questions on General Verdict

JACINTO CARMONA

-v-

MOORE-McCORMACK LINES, INC.

cc No. 63/66

2nd Theory of Action (NEGLIGENCE)

1. Do you find that the Plaintiff has sustained his burden of proof of (1) that the Defendant was negligent and (2) that the Defendant's negligence played any part in causing the Plaintiff's illness?

(Answer Yes or No) _____

(If your answer is No, then there is no need to answer the remaining interrogatories.)

(If the answer is Yes, proceed with the remaining interrogatories.)

---

2. If you find that the Plaintiff has sustained his claim what do you find is the total amount of the damages?

$_____

3. Do you find that the Defendant has sustained its burden of proof that the Plaintiff, by his own conduct, contributed to the accident in whole or part?

Questions on General Verdict

(Answer Yes or No) _____

4. If your answer to question No. 3 is in the affirmative, to what extent (in percentage) was Plaintiff contributorily negligent?

_____%

5. If you have found that the Defendant has sustained its burden of proof that the Plaintiff was contributorily negligent, then what sum have you deducted from the total amount of the damages you have found to have been sustained by the Plaintiff in your answer to Question No. 2 above?

$_____

6. Net amount of your verdict. (Subtract amount given in answer to question No. 2 by amount stated in answer to question No. 5.) $_____

FILE COPY

JUN 7 1

MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Docket No. 72-1492

JACINTO CARMONA,

Petitioner,

vs.

MOORE-McCORMACK LINES, INC.,

Respondent.

BRIEF FOR MOORE-McCORMACK LINES, INC. IN OPPOSITION

JOHN H. REILLY, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Docket No. 72-1492

JACINTO CARMONA,

Petitioner,

vs.

MOORE-McCORMACK LINES, INC.,

Respondent.

BRIEF FOR MOORE-McCORMACK LINES, INC. IN OPPOSITION

Jurisdiction

The judgment of the Supreme Court of the State of New York was entered on July 30, 1970. The order of the Appellate Division unanimously affirming the judgment of the Supreme Court was entered on October 31, 1972. On January 12, 1973 the Court of Appeals of the State of New York denied petitioner's motion for leave to appeal to the Court of Appeals from the order of the

Appellate Division. The judgment of affirmance was entered in the Supreme Court of the State of New York on February 2, 1973. The petition for writ of certiorari was received by respondent on May 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Question Presented

Did the charge to the jury in this personal injury action based on negligence and unseaworthiness include prejudicial error?

Statement

The complaint alleged that "on or about March, 1964, plaintiff was caused to suffer an illness during the course and scope of his employment and during his service aboard the vessel" (7).* "That the above described illness was caused solely by the negligence of the defendant and the unseaworthiness of the vessel, without any fault on the part of the plaintiff contributing thereto" (8).

In reply to the defendant's demand for a bill of particulars the plaintiff swore on October 20, 1965 that he incurred a tubercular condition of the lungs in March, 1964 aboard the defendant's vessel by reason of the improper heating and ventilation in his quarters (13). In a supplemental bill of particulars, verified January 12, 1967 the plaintiff advised the defendant that he further contended that he incurred an activation and/or aggravation of a tubercular condition (19).

Plaintiff joined the defendant's vessel, the *Mormaccove*, on January 21, 1964 (42). The vessel was then four years

* Page numbers in parenthesis refer to the transcript of the trial record reprinted as the Record on Appeal to the Appellate Division.

old (197). He had his own bedroom with an adjoining shower and toilet (197). The vessel made a coastwise voyage, and on January 28, 1964 sailed across the North Atlantic to Scandinavia and Northern European ports (45). The ship returned to New York on March 10, 1964 (45). During this first voyage the plaintiff had no difficulty with the temperature in his room (220). Plaintiff testified that on his first trip the outside temperature was not cold; one could sit out on deck (46), but the ship's deck log recorded daily temperatures below freezing at various hours between February 16 and February 27 (Defendant's Exhibit C).

The *Mormaccove* left New York on the plaintiff's second voyage to Europe on March 17, 1964 (47). According to plaintiff's testimony there was a tremendous wind and it became cold three days after the ship sailed from New York; when he awakened the following morning his chest and throat hurt and he was coughing (48-49); cold air was coming into his room through the heater (49). The vessel's deck log shows the outside temperature did not go below 40° during the seven days the *Mormaccove* was engaged in its passage from New York to Antwerp (Def. Ex. D).

The plaintiff's room was heated by a hot and cold diffuser system and an electric heater (393). There was a steam radiator in the toilet and shower room which adjoined his bedroom (393, 617-619). Ship's officers went to the plaintiff's room to look at his heater the day after he complained about it (229). Thereafter ship's officers came to his room to look at his heater every day (233). The plaintiff put a towel in his heater the first night he felt cold (233).

Chief Engineer Yaeger checked the temperature in the plaintiff's room with a thermometer (393-394). Yaeger may have made as many as five visits to the plaintiff's room to check its temperature (395) and he found the tem-

perature to be comfortable (394). The Chief Engineer found the diffusing system, electric heater and radiator to be working all night (395) and he found towels stuffed into the ventilating system several times (396). Chief Officer Butler found the temperature in the plaintiff's room to be quite normal (593).

The plaintiff's examination at the United States Public Health Service facility in New York on November 15, 1963 included a chest X-ray which revealed a patchy clouding in the right upper lung field and right mid-lung field having the appearance of pneumonitis (Plaintiff's Exhibit 8; 780). The examination of the plaintiff by the defendant's physician on January 21, 1964 did not include an X-ray (148).

Plaintiff's Medical Testimony

William Weingarten, M.D. testified that the plaintiff was "*well when he boarded the ship*" [Mormaccove] (97) "and that most of us have a dormant or sleeping focus of tuberculosis within our body, mostly in the lungs, which is kept in check and within a limited area by the patient's resistance and ability to form antibodies" (97). It was the opinion of Dr. Weingarten that the plaintiff became chilled, developed a cough and a lower resistance and, therefore, was unable to cope with the tubercular bacilli within his body (98).

Defendant's Medical Testimony

Lawrence Scharer, M.D., reviewed the plaintiff's chest X-ray, dated November 15, 1963 (Plaintiff's Exhibit 19) and the X-rays taken March 28, 1964 (Plaintiff's Exhibits 20A and 20B) and concluded that the plaintiff clearly had evidence of early tuberculosis in the right upper lung field in November, 1963 and the X-rays of March, 1964 showed

the same disease at a different stage of its progression (532-533).

Charge of the Court

The Court charged the jury that the plaintiff alleged that in March of 1964 he became ill with tuberculosis because of the failure of the defendant to provide and maintain suitable quarters for him aboard ship (671, 672).

The issue as stated by the Court was "whether the condition of the plaintiff or the reactivating of the plaintiff's tuberculosis was caused through the failure of the defendant to provide the plaintiff with proper quarters aboard ship or whether the defendant negligently failed to repair the broken manual device, if it became broken during the course of the voyage, and thereby caused or contributed to the illness or activated the tuberculosis of the plaintiff (674).

In its consideration of the claim of unseaworthiness the Court charged the jury that improper working conditions aboard ship which proximately cause or contribute to the seaman's illness will make the vessel unseaworthy (676). The judge told the jury that an act or failure to act is a proximate cause of an injury if it is a substantial factor in bringing about the injury or without which factor the injury would not have occurred (678).

The jury was also charged that for the plaintiff to recover and for the defendant to be held responsible for the illness of the plaintiff, the reactivated tubercular condition of the plaintiff must have resulted as a natural and proper consequence of the defendant's failure to provide plaintiff with a proper living quarters or a seaworthy vessel or the defendant must have been negligent in whole or in part or in some way contributed to the plaintiff's illness through an act or omission from which defendant could

reasonably foresee that an injury or illness could probably occur (685).

In its charge on damages the Court instructed the jury as follows:

> "You must remember that the plaintiff's claim is that the defendant caused his tubercular condition to be reactivated and you must apportion damages accordingly.
>
> If the plaintiff's condition was reactivated or aggravated, plaintiff is entitled to recover for any disability or pain resulting from the reactivation or aggravation. He is not, however, entitled to recover for any particular ailment or disability which existed prior to this alleged incident or for any condition or illness from which he may now be suffering which was not caused by this alleged defective air circulating system.
>
> Recovery must be confined to those damages due to the enhancement and aggravation or reactivation of the plaintiff's tubercular condition. In essence, the plaintiff should be compensated only to the extent that you find that he was further disabled by the defendant's negligence or the defendant's failure to provide living quarters" (692-693).

Argument

The petitioner urges that a seaman who seeks to recover damages for personal injuries based upon allegations of unseaworthiness should not have the burden of establishing that the unseaworthiness was the proximate cause of his injury. No direct authority is offered for this proposition. It is the petitioner's argument that a seaman claiming damages for unseaworthiness should be

required to meet only the standard of causation required in a Jones Act suit.

The petitioner would overlook that a plaintiff in a Jones Act suit is favored with the special standard of negligence that has been imposed under the Federal Employers' Liability Act; a standard unlike any imposed by the general maritime law. In searching for statutory guidance to determine the beneficiaries who were entitled to recover in an action under the general maritime law for death caused by violation of maritime duties, this Court wrote in *Moragne* v. *State Marine Lines*, 398 U. S. 375, 407 (1970) with regard to the Jones Act as follows:

> ". . . the beneficiary provisions of the Jones Act are applicable only to a specific class of actions—claims by seamen against their employers—based on violations of the special standard of negligence that has been imposed under the Federal Employers' Liability Act. That standard appears to be unlike any imposed by general maritime law."

Moreover, in the case at bar there was no issue as to notice and the jury concluded that the defendant was not negligent. The Trial Judge instructed the jury:

> "The agreed testimony in this case is that the manual device controlling the flow of air into the plaintiff's room was operating properly at the inception of the voyage. At a certain time after the ship departed from New York, the plaintiff complained that the room was cold and that the system of ventilation was not functioning properly.
>
> It is undisputed that the plaintiff brought this alleged condition to the attention of the chief steward and other supervisory personnel of the defendant aboard ship.

> If this alleged condition existed and notice was given by the plaintiff to the defendant and then the defendant was—then the defendant was obligated to repair and restore the air circulating system so that it would function properly and the failure of the defendant to repair the system constitutes negligence. On the other hand, if you find the air circulating system was not defective or that there was no negligence on the part of the defendant or that the negligence of the defendant played no part whatsoever in causing the plaintiff's illness, your verdict will be for the defendant on this cause of action."

The jury was given interrogatories with regard to the negligence action. The interrogatories are printed at pages 21A and 22A of the Petition. The jury answered these interrogatories in the negative finding that the petitioner had failed to sustain his burden of proof that the defendant was negligent and that defendant's negligence played any part in causing the plaintiff's illness.

CONCLUSION

The petitioner's theories of liability were fully explained to the jury. Having resolved the negligence claim in favor of the respondent the facts in this case required the jury to also find for the respondent on the unseaworthiness claim.

We respectfully submit that the petition for certiorari should be denied.

Dated: New York, N. Y.
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Respectfully submitted

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